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No. 33446-1

STATE OF WASHINGTON

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

AMERICAN SAFETY CASUALTY INSURANCE COMPANY,

Appellant,

v.

CITY OF OLYMPIA,

Respondent.

BRIEF OF RESPONDENT CITY OF OLYMPIA

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I. ASSIGNMENTS OF ERROR

Olympia assigns no error to the trial court's Order Granting Defendant's Motion for Summary Judgment or to the trial court's Order Granting Defendant's Motion for Attorneys' Fees. CP 421-23; 478-79.

II. STATEMENT OF THE ISSUES

Olympia agreed to discuss alternative resolution of this dispute so that the parties could avoid this litigation. Yet Olympia has always insisted that American Safety Casualty Co. ("American Safety") comply with mandatory protest and claim procedures in the underlying contract. Olympia waited for American Safety to provide meaningful information so Olympia could assess the request and enter into discussions. The information never came, and the discussions never happened. Now, American Safety claims that Olympia's willingness to negotiate and its silence while waiting for American Safety's data waives Olympia's right to enforce the contract.

A. Should the Court affirm the trial court because American Safety failed to file this lawsuit within the contract's limitations period, and Olympia's willingness to negotiate does not waive its right to enforce the limitations period?

B. Should the Court affirm the trial court because Katspan failed to comply with the contract's explicit and well-understood protest

and claim requirements, and Olympia's willingness to negotiate does not waive its right to enforce the requirements?

C. Should the Court affirm the trial court because Katspan and American Safety failed to comply with the contract's clear protest and claim requirements and Olympia did not hinder their ability to do so?

III. COUNTERSTATEMENT OF THE CASE

American Safety's Statement of Facts omits important details about how it (and its assignor) continually failed to provide contractually required notice of its claims and supporting documentation. It also fails to mention Olympia's insistence on compliance with the contract's claim procedures. Accordingly, Olympia submits the following counterstatement of the case to provide a complete picture.

A. The Parties.

The underlying action on this appeal involves a construction contract between Katspan, Inc. and Olympia for the Downtown Olympia Segment of the LOTT Southern Connection Pipeline project (the "Project"). CP 61. LOTT Wastewater Management Partnership, now known as the LOTT Alliance ("LOTT"), managed the Project. *Id.* American Safety issued statutory payment and performance bonds on the Project. CP 7. During the course of the Project, Katspan experienced

financial difficulties and ultimately assigned its rights and obligations under the construction contract to American Safety. *Id.*¹

B. The Contract and Project Schedule.

Katspan and Olympia entered into a contract for the Project on July 26, 2000. CP 61-62, 70-71. The contract was primarily comprised of the 2000 Washington State Department of Transportation Standard Specifications for Road, Bridge and Municipal Construction and its APWA Supplement, the Supplemental Specifications,² and the Project-related plans (collectively, the “Contract”). *Id.* Under the Contract, Katspan was to receive, on the basis of lump sum payments and unit prices, an estimated amount of \$1,867,203, excluding tax. CP 62. The schedule allowed Katspan 17 calendar days to complete work on any given city block and 90 calendar days to complete the entire Project. CP 62-63, 74; Supp. Specs. §1-08.5. Katspan began work on September 5, 2000. CP 63. Thus, Katspan was to finish its work by December 4, 2000.

¹ For ease of reference, except for direct quotes, Olympia will generally refer to LOTT as the named party, Olympia.

² Olympia cites to the Standard Specifications using the abbreviation “Std. Spec.” followed by the specific section(s) to which it cites. Similarly, Olympia cites to the APWA Supplement as “APWA Supp.” and the Supplemental Specifications as “Supp. Specs.”

C. Katspan's Failure to Perform on the Project.

Katspan repeatedly failed to meet its contractual obligations. CP 63. On several occasions, Olympia had to direct Katspan to correct deficient work. *Id.* Moreover, Katspan could not stay on schedule. CP 63, 76-77. Katspan failed to meet both the 17 days per block requirement and the 90 days overall requirement. *Id.*

When the work was done, Olympia began preparations to close-out the Project and accept it as finally complete. CP 65. Project Engineer Parametrix, Inc. prepared a final change order to cover all uncontested additional work. CP 66, 97-101. Parametrix asked Katspan to execute the change order to obtain final payment. *Id.* Katspan never did. CP 66. Accordingly, on July 2, 2001, Olympia initiated the unilateral close-out of the Project. CP 66, 103-04.³ Pursuant to the unilateral close-out provisions in the Contract, Olympia accepted the Project as finally complete on September 10, 2001. CP 66-67, 106-07.

³ Olympia utilized the Contract's unilateral close-out provisions because of Katspan's failure to submit required documentation, not "[b]ecause of the difficulties Katspan was experiencing completing its work," as alleged by American Safety. Opening Brief at 4. The distinction is important because it is indicative of Katspan's and American Safety's constant failure to comply with the Contract's procedural requirements.

D. Contract Requirements Regarding Protests, Claims, and Lawsuits.

The Contract unambiguously sets out Katspan's and American Safety's obligations to follow specific procedures when filing protests, formal claims, or lawsuits. A contractor expressly waives its claims under the Contract if it fails to follow these procedures. CP 46-47, 53-57; Std. Spec. §§1-04.5, 1-09.11, 1-09.12.

1. Procedures for Filing a Protest.

The Contract required Katspan to immediately provide Olympia with a written notice of protest if it disagreed with "anything required in a change order, another written order, or an oral order from the Engineer, including any direction, instruction, interpretation, or determination by the Engineer." CP 46-47; Std. Spec. §1-04.5. Similarly, if Katspan believed its work was "suspended, delayed, or interrupted for an unreasonable period of time" due to Olympia's actions, Katspan was required to file an immediate written notice of protest under Std. Spec. §1-04.5. CP 49-50; Std. Spec. §1-08.6.

Katspan was to supplement the notice of protest in writing within 15 days with specified items of information in order to allow Olympia to evaluate the protest. CP 46-47; Std. Spec. §1-04.5. The Project Engineer then is to review the protest to determine if additional time or money was warranted. *Id.* Failure to comply with this procedure "completely waives

any claims for protested work.” *Id.* American Safety does not dispute that Katspan failed to comply with this contractual procedure.

2. Procedures for Filing an Administrative Claim.

The Contract allowed Katspan to file a formal administrative claim on any protest it filed under Std. Spec. §1-04.5 if it disagreed with the Project Engineer’s resolution of the protest. CP 53; Std. Spec. §1-09.11(1). Compliance with Std. Spec. §1-04.5 was a mandatory condition precedent to filing a formal administrative claim. *Id.* The Contract required a formal claim to include at least 10 specific items of information to allow Olympia to evaluate the claim, including a notarized statement by the Contractor certifying the facts contained in the claim. CP 53-55; Std. Spec. §1-09.11(2). Further, the Contract required Katspan to retain and produce records sufficient to allow Olympia’s auditors to verify its claim. CP 56; Std. Spec. §1-09.12(2). Failure to submit a substantively sufficient claim or to provide adequate supporting information to allow the auditors to verify the claim barred any recovery under the Contract. CP 53-54, 56; Std. Spec. §§1-09.11(2), 1-09.12(2).

3. Contractual Limitations Period.

Additionally, Katspan agreed to bring any cause of action on the Contract no later than 180 calendar days from the date of final acceptance of the Project. CP 55; Std. Spec. §1-09.11(3). Katspan also agreed that

“failure to bring suit within the time period provided, shall be a complete bar to any such claims or causes of action.” *Id.* The “final acceptance date” was the date on which the contracting agency accepts the work as complete. CP 59; APWA Supp. §1-01.3. Olympia unilaterally accepted the work as complete on September 10, 2001. CP 66-67. Thus, Katspan agreed to file a lawsuit by March 9, 2002, or waive its claims and rights of action.

E. Olympia’s Insistence that Katspan Comply with the Contract’s Protest and Claim Requirements, and Katspan’s Failure to Do So.

Because Katspan failed to complete the Project on time, Olympia’s counsel sent a letter reserving the right to withhold liquidated damages from future payments to Katspan. CP 337-39. In this letter, Olympia reserved its right to insist on strict compliance with Std. Spec. §1-04.5 for any claims that Katspan might allege:

LOTT reserves its right to demand strict compliance with all other terms of the contract documents, including but not limited to §1-04.5 of the Standard Specifications, which describes the required procedure for protest by the Contractor.

CP 338. In response, Katspan acknowledged that the procedural requirements of Std. Spec. §§1-04.5 and 1-09.11 would apply to any dispute under the Contract:

KATSPAN has, and will continue to make a good faith attempt to comply with the terms of the Contract documents, including but not limited to §1-04.5 of the Standard Specifications.

* * *

KATSPAN is pursuing resolution of its request for an equitable adjustment through the Project Engineer, but reserves its right to pursue any dispute that may result in accordance with the terms of §1-09.11.

CP 342.

Yet, Katspan still failed to comply with Std. Spec. §1-04.5. CP 65.

On April 18, 2001, Olympia's counsel sent a letter describing this failure, and explaining that Katspan had waived its claim under Std. Spec.

§1-09.11:

Despite Katspan's assertion that it has made specific and formal reservations of its rights, LOTT has not received any such notification and does not believe that Katspan has met the requirements for protest of §1-04.5 of the Standard Specifications. LOTT is unaware of any formal requests for additional time by Katspan or any grant of additional time from Parametrix. In fact, on several occasions, LOTT has requested written documentation supporting Katspan's allegations that additional time and money are due. To date, LOTT has not received any such written documentation. Thus, pursuant to §1-09.11, Katspan has waived any claims for which it did not comply with the requirements of §1-04.5.

CP 326-27. Katspan never disputed the contents of this letter, and never

provided any protest. CP 65.⁴

Instead, on November 26, 2001, more than seven months after Olympia informed Katspan that it had waived its contractual claims, American Safety presented Olympia with a document entitled, "Request for Equitable Adjustment on Southern Connection Pipeline" (hereafter, "Request").⁵ CP 116-321. This document requested \$767,995.02 for Katspan's alleged delays and extra costs. CP 119. American Safety titled this document as a "request," rather than a "claim" under Std. Spec. §1-09.11(2). CP 116. Moreover, the Request lacked the information required by Std. Spec. §1-09.11(2). Among other things, American Safety's Request lacked the notarized statement certifying that the claim is true, fully documented, and supported under the Contract. CP 54-55, 120; Std. Spec. §1-09.11(2)(10).

F. Olympia's Attempts to Avoid Litigation.

Olympia took no action on the Request until March 14, 2002. CP 68, 323, 333. On that date, counsel for American Safety left voicemail

⁴ American Safety does not even mention these letters in its Opening Brief.

⁵ The claim was prepared by American Safety's consultant, PCA Consulting Group. Notably, Jack Costenbader of PCA Consulting Group was copied on LOTT's counsel's April 18, 2001, letter, which informed Katspan its claims were waived under Std. Spec. §§1-04.5 and 1-09.11. CP 327.

for Olympia's counsel asking if the parties could arrive at a quick solution. CP 323, 329. Olympia agreed to enter into discussions. CP 68. Olympia sent a follow-up letter to American Safety's counsel asking for information to support the Request. CP 345-47.

Two months later, Olympia received two three-ring binders from American Safety with information compiled regarding the Request. CP 333. For the most part, this information did not respond to Olympia's request for information. CP 373. Thus, Olympia sent a second letter again seeking information to support the Request. CP 349-50.

In October 2002, American Safety's counsel announced that it was having difficulty obtaining Katspan documents and requested a meeting to discuss settlement. CP 323-24. In response, Olympia's counsel stated that Olympia would be willing to enter into such discussions, but would not negotiate on any claim items for which Katspan and American Safety provided inadequate or no supporting information. CP 331. Then, after more than another month of silence, Olympia's counsel wrote another letter confirming that Olympia was willing to negotiate with American Safety in an attempt to avoid litigation. CP 354-55. This letter expressly stated that Olympia was willing to negotiate but would not waive its defenses:

Without waiving any of its defenses, LOTT has stated several times that it is willing to negotiate these claims in order to come to a quick resolution.

CP 354 (emphasis added). Because of American Safety's continued non-responsiveness, Olympia's counsel also asked if the Request had been abandoned. *Id.* Again, American Safety did not respond. CP 334. Discussions did not proceed any further. *Id.*

On or about January 22, 2003, American Safety's counsel informed Olympia's counsel that it had received 4-5 banker's boxes of documents from Katspan and that the boxes were available for review. *Id.* Olympia's counsel reviewed and copied several of these documents one week later. *Id.* Even then, some of the key information Olympia requested was still missing. CP 373. Accordingly Olympia's counsel requested the same supporting information it had been requesting for over a year. CP 357-58. Olympia warned that the Request would be denied if American Safety did not provide the additional information by May 16, 2003. CP 358. Two days before this deadline, American Safety's counsel wrote: "we are presently determining the feasibility of accommodating Olympia's request for supplemental information, or creating the equivalent." CP 368. However, the documentation did not arrive. CP 334. Thus, Olympia denied American Safety's unsupported Request. *Id.*

More than two months later, American Safety's new claims consultant Thomas Presnell sent an email to Paul Pedersen, Olympia's forensic accountant, asking him what information was necessary to support the Request. CP 142. Mr. Pedersen responded that he had authority "to discuss the LOTT matter" with Mr. Presnell. CP 414. Mr. Presnell then sent Mr. Pedersen an email asking what format to put the information in, and inviting Mr. Pedersen to a preliminary meeting. CP 416. Mr. Pedersen responded: "In regard to format, I really can't tell you exactly what should be done...." CP 418. Mr. Pedersen also suggested that Mr. Presnell come up with a format and then meet with Mr. Pedersen before Mr. Presnell "set out on a lengthy process." CP 419. Mr. Presnell agreed to meet and discuss a proposed format. CP 418. But there is no record of this meeting, or any other discussions between the consultants, ever taking place.

In fact, Olympia heard nothing about this dispute from American Safety directly for more than one year since Olympia halted discussions on the Request. CP 335. On May 21, 2004, American Safety's counsel called Olympia's counsel and said it finally had the cost data necessary to evaluate the Request. *Id.* Olympia replied that American Safety's Request did not comply with the Contract and had been denied more than a year ago for lack of information. CP 370. American Safety then filed

this lawsuit on August 17, 2004: 891 days after the contractual limitations period had expired. CP 6.

IV. STANDARD OF REVIEW

The standard of review for an order of summary judgment is *de novo*; the appellate court is to perform the same inquiry as the trial court. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). The trial court grants summary judgment if the pleadings, affidavits, and depositions establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Id.* at 300-01, CR 56(c). On review of an order granting a motion for summary judgment, the appellate court will consider only evidence and issues called to the attention of the trial court. RAP 9.12.

V. ARGUMENT

The trial court properly granted Olympia's motion for summary judgment and dismissed the present lawsuit. There is no dispute that American Safety filed its lawsuit well beyond the contract's 180-day contractual limitations period. There is also no dispute that American Safety and Katspan failed to satisfy any of the conditions precedent to seeking additional compensation under the Contract.

Instead, American Safety asserts that Olympia has somehow waived its right to enforce the contract's requirements because Olympia

expressed willingness to negotiate rather than litigate. American Safety would have the Court penalize Olympia for trying to resolve this dispute outside of litigation. Neither the evidence nor the law supports this result.

A. American Safety's Claims Must Be Dismissed Because It Failed to Comply with Mandatory Requirements in the Contract.

Washington law requires contractors to comply with protest and claim provisions in a construction contract unless compliance has been waived. *Absher Constr. Co. v. Kent Sch. Dist. No. 415*, 77 Wn. App. 137, 142, 890 P.2d 1071 (1995). “[C]ourts consistently hold that, absent waiver, failure to comply bars relief.” *Mike M. Johnson, Inc. v. Spokane County*, 150 Wn.2d 375, 389, 78 P.3d 161 (2003).

The Washington Supreme Court recently addressed the very same procedural requirements at issue in this case in *Mike M. Johnson*.⁶ In that case, a contractor sued Spokane County for cost overruns on a sewer project. *Id.* at 377. Spokane County won summary judgment before the trial court because the contractor failed to comply with protest and claim provisions in the contract. *Id.* The Court of Appeals reversed. *Id.* The Supreme Court reinstated the trial court’s summary judgment dismissal,

⁶ The Supreme Court addressed the 1996 version of the WSDOT Standard Specifications. The relevant portions of the 1996 version are identical to the 2000 version. *Cf. Johnson*, 150 Wn.2d 375 (quoting sections from 1996 Std. Spec.) with CP 46-59 (applicable portions of 2000 Std. Spec.).

holding that the Standard Specifications require strict compliance with protest and claim provisions and that “actual notice is not an exception to contract compliance.” *Mike M. Johnson*, 150 Wn.2d at 391. The Court explicitly recognized that a contractor “completely waives any claims for protested work,” by failing to comply with protest procedures. *Id.* at 380 (quoting Std. Spec. §1-09.11).

American Safety never disputes that Katspan failed to comply with mandatory requirements in the Contract. Instead, American Safety argues that Olympia somehow waived its right to enforce them. This effort does not save American Safety from dismissal on summary judgment because Olympia’s conduct did not waive mandatory contract requirements.

B. Olympia Did Not Engage in Clear, Voluntary, and Unequivocal Conduct that Waived Mandatory Contract Requirements.

Katspan had an express duty to comply with the Contract’s protest and claim provisions, under the penalty of forfeiting its claim rights. Katspan failed to meet this duty and thus forfeited its claim rights. In contrast, Olympia had no duty to respond to the Request. Hence, its willingness to enter negotiations on the Request cannot waive its contract rights. Absent a failure to comply with an express contractual duty, a party may waive its rights under a contract through conduct only if it amounts to “the intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of

such right.” *Birkeland v. Corbett*, 51 Wn.2d 554, 565, 320 P.2d 635 (1958):

The person against whom a waiver is claimed must have intended to relinquish the right, advantage, or benefit, and his actions must be inconsistent with any other intention than to waive them.

Id. “Intent cannot be inferred from doubtful or ambiguous factors.” *Wagner v. Wagner*, 95 Wn.2d 94, 102, 621 P.2d 1279 (1980). Thus, Olympia’s actions must unequivocally show intent to waive its right to rely on contractual provisions:

Waiver by conduct requires unequivocal acts of conduct evidencing an intent to waive.

Absher, 77 Wn. App. at 143; *see also Mike M. Johnson*, 150 Wn.2d at 391. American Safety never mentions these basic tenets of waiver law in its Opening Brief, and it cannot establish such an intent on behalf of Olympia.

The Supreme Court’s holding in *Mike M. Johnson* directly applies here. The Supreme Court held that the owner did not unequivocally waive the contract’s claim procedures in part because the owner wrote letters that insisted on compliance with the contract’s procedures and that stated the owner did not waive its defenses. *Id.* at 392. Similarly, Olympia wrote letters to Katspan insisting that Katspan comply with the Contract’s claim procedures. CP 338, 326-27. Olympia also wrote a letter to American Safety expressly stating that its willingness to enter into settlement

discussions was “[w]ithout waiving any of its defenses.” CP 354. American Safety either ignores these letters in its Opening Brief or, in the case of the November 12, 2002, letter, fails to mention Olympia’s express reservation of rights.

American Safety’s attempt to distinguish *Mike M. Johnson* misses the mark. American Safety suggests that *Mike M. Johnson* does not apply because the parties in this case discussed only the Request rather than other claims in conjunction with the Request. American Safety ignores the sound reasoning behind the Supreme Court’s holding that negotiations do not waive defenses:

Adopting MMJ’s view would have the county unrealistically halt all discussions for fear of evidencing its intent to waive mandatory claim provisions under the contract. We decline to reach such result, as it would detrimentally impact all concerned.

*Id.*⁷ The Supreme Court held the contractor in *Mike M. Johnson* to the same mandatory claims provisions at issue in this case despite attempts at negotiation. The trial court properly applied *Mike M. Johnson* to this case and should be affirmed.

⁷ The Washington Supreme Court also held in *Dunlap*, 23 Wn.2d 827, that settlement discussions do not waive a defendant’s right to rely on the contract’s procedural claim requirements, as is discussed *infra*, in Section V.C.3.

C. American Safety's Claim of Waiver Does Not Create an Issue of Fact.

Moreover, American Safety cannot create an issue of fact sufficient to avoid summary judgment by claiming waiver. As the nonmoving party, American Safety can only avoid summary judgment with specific facts. *Young v. Key Pharms.*, 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989). Mere unsupported conclusory allegations and argumentative assertions will not defeat summary judgment. *Absher*, 77 Wn. App. at 141-42. In *Mike M. Johnson*, the Supreme Court held that there was no genuine issue of material fact regarding the owner's right to rely on contractual claims requirements based on letters in the record wherein Spokane County expressly reserved its contractual rights, despite evidence that the County continued negotiations with the contractor. 150 Wn.2d at 391-92. Indeed, Washington appellate courts have repeatedly affirmed dismissal and declined to find issues of fact regarding waiver under similar circumstances. *See, e.g., Absher*, 77 Wn. App. at 139 (affirming summary judgment); *Dunlap v. West Constr. Co.*, 23 Wn.2d 827, 831, 162 P.2d 448 (1945) (affirming a dismissal at the close of plaintiff's case).

In this case, American Safety must have produced evidence of unequivocal acts by Olympia that show intent to waive a known right.

American Safety could not do so at trial court and cannot do so on appeal because there are no such “unequivocal acts.” American Safety can only point to discussions regarding potential negotiations on its Request. At most, these discussions show intent to seek a quick resolution and avoid this lawsuit. CP 323, 331.⁸ They do not constitute an unequivocal intent to waive Olympia’s contractual defenses.

1. Olympia Expressly Reserved Its Right to Rely on Its Contractual Defenses.

The record establishes that Olympia expressly reserved its rights under the Contract. The record contains three written communications in which Olympia expressly reserved or even asserted its contractual rights and defenses.

First, Olympia reserved this right when it became apparent that Katspan could not meet its contractual duties. Olympia informed Katspan that it would demand strict compliance with the Contract’s claim procedures:

⁸ Olympia’s desire to negotiate rather than litigate is also evident from its letter to the State Auditor, cited by American Safety in its Opening Brief: “[Olympia] would prefer to respond through an out-of-court settlement, but failing that, would defend any legal action vigorously if Katspan or its surety files a lawsuit.” CP 408.

LOTT reserves its right to demand strict compliance with all other terms of the contract documents, including but not limited to § 1-04.5 of the Standard Specifications, which describes the required procedure for protest by the Contractor.

CP 338. Katspan acknowledged that Std. Spec. §1-09.11, including the limitations provision in Std. Spec. §1-09.11(3), applied to any claim Katspan would bring under the Contract: "KATSPAN ... reserves its right it pursue any dispute that may result in accordance with the terms of §1-09.11." CP 342.

Second, Olympia asserted its contractual defenses during the Project to let Katspan know it had lost its claim rights. Olympia sent Katspan a letter describing Katspan's failure to comply with the mandatory claim procedures. CP 326-27. Olympia's letter further informed that Katspan that it had therefore waived any right to a claim under Std. Spec. §1-09.11:

In fact, on several occasions, LOTT has requested written documentation supporting Katspan's allegations that additional time and money are due. To date, LOTT has not received any such written documentation. Thus, pursuant to §1-09.11, Katspan has waived any claims for which it did not comply with the requirements of §1-04.5.

CP 326-27.

Third, Olympia reserved its right to rely on the limitations procedure during discussions with American Safety after the completion

of the Project. American Safety presented Olympia with its Request and asked if Olympia would enter into discussions “about some possible quick solutions.” CP 329. Olympia agreed to investigate whether a quick resolution would be possible, but only if American Safety could provide documents substantiating its Request. CP 345. American Safety did not provide the requested documentation. Thus, Olympia wrote another letter noting that, while no negotiations had yet occurred, Olympia was willing to negotiate towards a quick resolution “[w]ithout waiving any of its defenses.” CP 354 (emphasis added).

American Safety argues that Olympia’s reservations of rights were insufficient because they did not specifically mention the contractual limitations period. Opening Brief at 16. There is no support for this argument. A party is not required to disclose its litigation strategy when discussing the possibility of settlement discussions with another party. American Safety incorrectly attempts to shift the burden to Olympia to show it did not waive its contractual defenses. However, in order to defeat summary judgment, American Safety bears the burden to show unequivocal acts by Olympia evidencing intent to waive its rights. *See Absher*, 77 Wn. App. at 143. American Safety cannot do so because of Olympia’s repeated reservations of rights and the lack of record evidence

showing an unequivocal intent to waive these rights. The case was properly dismissed on summary judgment and should be affirmed.

2. Olympia Did Not Extend the Time for American Safety to Comply with the Contract's Claim Procedures.

Olympia's willingness to discuss American Safety's Request did not extend the Contract's time requirements. American Safety attempts to blur the line between a claim under the Contract and its "Request" because there is no dispute that American Safety did not comply with the contract's claim requirements. By the time American Safety submitted its "Request," the time to comply with Std. Spec. §1-04.5, and thus §1-09.11, had long passed. Perhaps in recognition of this fact, American Safety presented its Request. But the Court should not permit American Safety to resurrect its lapsed claim rights simply by recasting its claim as a "Request."

At most, the Request was an extra-contractual effort at settlement as it did not meet the procedural or substantive contractual requirements for a claim. Thus, Olympia had no contractual obligation to respond formally. Olympia's behavior after receipt of the Request is consistent with that understanding. Olympia waited over three months for American Safety to follow up on the Request. CP 116, 323, 333. Only after American Safety's counsel finally called and initiated a conversation did

Olympia agree to have a dialog about whether the issues between the parties could quickly be resolved. Olympia's willingness to discuss the Request was entirely separate from Katspan's contractual claim rights, which Olympia already stressed Katspan had waived. CP 326-27. Discussions regarding American Safety's informal Request are unrelated to the protest and claim procedures in the Contract, which had already lapsed. The parties' informal discussions do not change Katspan's failure to properly protest under Std. Spec. §1-04.5 and do not extend the Contract's limitations period. The trial court properly granted summary judgment.

3. Discussions after the Expiration of the Contractual Limitations Period Cannot Extend the Limitations Period.

The parties' informal discussions also do not waive the contractual limitations period because they occurred after the period had already expired. *See Carroll v. Hill Tract Improvement Co.*, 44 Wash. 569, 573, 87 P. 835 (1906). The 180-day limitations period ran out on March 9, 2002. At the earliest, the discussions about a potential negotiation did not occur until March 14, 2002. CP 323, 329. Thus, these discussions could not have tolled the statute of limitations.

Moreover, a party is only estopped from relying on the statute of limitations "when his actions have fraudulently or inequitably invited a

plaintiff to delay commencing suit until the applicable statute of limitations has expired.” *Del Guzzi Constr. Co., Inc. v. Global Northwest Ltd., Inc.*, 105 Wn.2d 878, 885, 719 P.2d 120 (1986) (emphasis added). Here, American Safety has not even alleged fraud or pointed to actions that could reasonably be construed as inequitable. Rather, Olympia took no action whatsoever until after the limitations period passed. Olympia only took action in response to a telephone call from American Safety’s attorney. CP 68, 323, 333. Thus, Olympia could not have induced American Safety to delay filing this lawsuit until after the limitations period.

American Safety would have the Court penalize Olympia for its openness to settlement negotiations.⁹ But a rule requiring parties to halt all negotiations for fear of showing intent to waive claim provisions would “detrimentally impact all concerned.” *Mike M. Johnson*, 150 Wn.2d at 383-384. Even before *Mike M. Johnson* and under facts strikingly similar to this case, the Washington Supreme Court held that negotiations do not waive the right to rely on contractual claims procedures. In *Dunlap*, 23 Wn.2d 827, the plaintiff entered into a contract with a construction company that required it to provide written notice of a claim

⁹ The discussions between the parties never actually proceeded to settlement negotiations because American Safety never provided the

within 30 days after the claim accrued and then provide a written proof of claim within an additional 30 days thereafter. *Id.* at 829. The plaintiff did neither. *Id.* at 830. Instead, plaintiff submitted a written claim several months after the claim accrued. *Id.* A representative of the construction company discussed the claim with plaintiff's counsel and requested details of the demand. *Id.* The Supreme Court held "negotiations, discussion, and efforts to arrive at a settlement" did not impliedly waive a contractual requirement to provide notice of claims. *Id.* at 830. Similarly, American Safety failed to meet the Contract's notice of claim requirements but submitted its Request anyway. Also similarly, Olympia requested additional information on the Request in an effort to arrive at settlement. As the Supreme Court held in *Mike M. Johnson* and in *Dunlap*, discussions along these lines, even if they progress to settlement discussions, do not constitute a waiver of the Contract's claims procedures. Olympia has not waived the contracts procedural requirements. The trial court's dismissal should be affirmed.

4. Discussions between Claims Consultants Could Not Waive Olympia's Right to Rely on Contractual Defenses.

Further, American Safety wrongly suggests that Olympia waived its rights when it hired a forensic accountant to review American Safety's

requisite supporting information.

Request. Olympia informed American Safety that it would no longer be willing to engage in negotiations if American Safety did not provide documents supporting its Request for Equitable Adjustment by May 16, 2003. CP 358. The documentation did not arrive. CP 334. Then, on July 31, 2003, American Safety's claim consultant Thomas Presnell contacted Paul Pederson, Olympia's forensic accountant, to discuss the matter. CP 412. Mr. Pederson replied that he was "given the green light to discuss the LOTT matter" with Mr. Presnell. CP 414. The parties then discussed the possibility of a meeting, though no meeting actually took place. CP 418-19.

These discussions do not evince intent by Olympia to waive its Contract defenses. Olympia has found no authority, and American Safety provides none, whereby an independent claims consultant can waive its client's defenses in a lawsuit. In any event, waiver by conduct requires unequivocal acts showing intent to waive the defenses. *See supra*. Mr. Pederson only agreed to "discuss the LOTT matter" with Mr. Presnell. CP 414. Mr. Pederson never mentioned a purported intent to waive Olympia's contractual defenses.

Moreover, Mr. Pedersen could not bind Olympia to consider information provided by American Safety. In order for Mr. Pederson to be Olympia's agent to negotiate a claim and waive its defenses, both Olympia

and Mr. Pederson would have to agree to such an agency relationship. *Stansfield v. Douglas County*, 107 Wn. App. 1, 17, 27 P.3d 205 (2001). American Safety has the burden of proving that Mr. Pederson was Olympia's agent for these purposes. *Id.* In order for American Safety to establish Mr. Pederson's actual or apparent authority to waive claims, American Safety must produce evidence of Olympia's objective manifestations of that authority. *Smith v. Hansen, Hansen & Johnson, Inc.*, 63 Wn. App. 355, 363, 818 P.2d 1127 (1991) (holding that both actual and apparent authority depend upon objective manifestations of the principal communicated to the claimant.) No such manifestations by Olympia exist. Mr. Pederson did not waive Olympia's defenses, nor did he have the authority to do so. The trial court correctly concluded that Olympia did not waive its rights under the contract and should be affirmed.

D. Olympia Did Not Prevent American Safety from Complying with the Contract's Informational Requirements.

American Safety's claim that Olympia hindered its ability to file a claim also fails. This case is very different from Division III's decision in *Weber Construction v. Spokane County*, 124 Wn. App. 29, 98 P.3d 60 (2004). In that case, Weber Construction sued Spokane County under a contract that included the very same provisions at issue in this case.

Unlike this case, however, Weber asked Spokane County for specific information so Weber could prepare supplemental information required under Std. Spec. §1-04.5. *See id.* at 34. The County, knowing this information was necessary for Weber to comply with the protest provisions, failed to provide the requested information. *Id.* After remand by the Supreme Court for reconsideration in light of its *Mike M. Johnson* decision, the Court of Appeals held that an owner waives its right to rely on the Contract's protest and claim provisions if the owner frustrates the contractor's ability to comply. *Id.* at 35.

By contrast, Olympia did not fail to provide Katspan with any information it needed to file a protest under Std. Spec. §1-04.5. Instead, Katspan simply failed to file the required protest, even in light of Olympia's insistence on it. CP 338, 326-27. Though Olympia refused to consider information obtained by American Safety years after Project completion, American Safety had already waived its claims under the Contract through no fault of Olympia. CP 46-47, 53-55; Std. Spec. §§1-04.5, 1-09.11. *Weber Construction* is inapposite, and the trial court should be affirmed.

In summary, the Contract required Katspan, American Safety's predecessor in interest here, to comply with specific protest and claim procedures in order to advance a claim for additional compensation. It

required Katspan (or American Safety) to file a subsequent lawsuit within 180-days after project completion. The parties agree that Katspan and American Safety did not meet any of these requirements. Instead, they argue that Olympia's conduct waived its right to enforce the Contract's protest and claims provisions and its limitations period. None of the evidence in the record nor any applicable law supports this result. The trial court correctly dismissed American Safety's claim on summary judgment and should be affirmed.

VI. REQUEST FOR ATTORNEYS' FEES

Olympia is entitled to its attorneys' fees and costs on appeal. The trial court properly awarded Olympia its fees and costs pursuant to RCW 39.04.240. CP 478-79. This statute also allows the award of fees and costs on appeal. *See, e.g., Absher*, 79 Wn. App. at 843-44 (awarding attorneys' fees to prevailing party on appeal pursuant to RCW 39.04.240). Thus, Olympia respectfully requests that the Court award it the attorneys' fees and costs it incurs on appeal pursuant to RAP 18.1(b).

VII. CONCLUSION

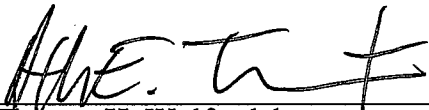
This Court should affirm the trial court's Order Granting Defendant's Motion for Summary Judgment and Order Granting Defendants' Motion for Attorneys' Fees. CP 421-23, 478-79. There is no dispute that Katspan and American Safety failed to comply with the

Contract's claim procedures. There is no evidence that Olympia unequivocally intended to waive its right to rely on the Contract's procedural defenses. Instead, Olympia insisted that Katspan comply with the Contract's notice procedures and then, when agreeing to discuss American Safety's Request for Equitable Adjustment, it reserved its right to rely on its Contract defenses. American Safety can only show documents evidencing Olympia's agreement to try and resolve this case expediently, which does not waive a party's right to its Contract defenses as a matter of law. The trial court should be affirmed.

DATED this 13th day of February, 2006.

Respectfully submitted,

PRESTON GATES & ELLIS LLP

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APPENDIX A

The Contractor shall proceed with the work upon receiving:

1. A written change order approved by the Engineer, or
2. An oral order from the Project Engineer before actually receiving the written change order.

Changes normally noted on field stakes or variations from estimated quantities, except as provided in sub-paragraph A or B above, will not require a written change order. These changes shall be made at the unit prices that apply. The Contractor shall respond immediately to changes shown on field stakes without waiting for further notice.

The Contractor shall obtain written consent of the surety or sureties if the Engineer requests such consent.

The Contracting Agency has a policy for the administration of cost reduction alternatives proposed by the Contractor. The Contractor may submit proposals for changing the Plans, Specifications, or other requirements of the Contract. These proposals must reduce the cost or time required for construction of the project. When determined appropriate by the Contracting Agency, the Contractor will be allowed to share the savings.

Guidelines for submitting Cost Reduction Incentive Proposals are available at the Project Engineer's office. The actions and requirements described in the guidelines are not part of the Contract. The guidelines requirements and the Contracting Agency's decision to accept or reject the Contractor's proposal are not subject to arbitration under the arbitration clause or otherwise subject to litigation.

1-04.5 Procedure and Protest by the Contractor

If in disagreement with anything required in a change order, another written order, or an oral order from the Engineer, including any direction, instruction, interpretation, or determination by the Engineer, the Contractor shall:

1. Immediately give a signed written notice of protest to the Project Engineer or the Project Engineer's field inspectors before doing the work;
2. Supplement the written protest within 15 calendar days with a written statement providing the following:
 - a. The date of the protested order;
 - b. The nature and circumstances which caused the protest;
 - c. The contract provisions that support the protest;
 - d. The estimated dollar cost, if any, of the protested work and how that estimate was determined; and
 - e. An analysis of the progress schedule showing the schedule change or disruption if the Contractor is asserting a schedule change or disruption; and
3. If the protest is continuing, the information required above, shall be supplemented as requested by the Project Engineer. In addition, the Contractor shall provide the Project Engineer, before final payment, a written statement of the actual adjustment requested.

Throughout any protested work, the Contractor shall keep complete records of extra costs and time incurred. The Contractor shall permit the Engineer access to these and any other records needed for evaluating the protest as determined by the Engineer.

The Engineer will evaluate all protests provided the procedures in this section are followed. If the Engineer determines that a protest is valid, the Engineer will adjust payment for work or time by an equitable adjustment in accordance with Section 1-09.4. Extensions of time will be evaluated in accordance with Section 1-08.8. No adjustment will be made for an invalid protest.

In spite of any protest, the Contractor shall proceed promptly with the work as the Engineer orders.

The Contractor accepts all requirements of a change order by: (1) endorsing it, (2) writing a separate acceptance, or (3) not protesting in the way this section provides. A change order that is not protested as provided in this section shall be full payment and final settlement of all claims for contract time and for all costs of any kind, including costs of delays, related to any work either covered or affected by the change.

By not protesting as this section provides, the Contractor also waives any additional entitlement and accepts from the Engineer any written or oral order (including directions, instructions, interpretations, and determinations).

By failing to follow the procedures of this section and Section 1-09.11, the Contractor completely waives any claims for protested work.

1-04.6 Increased or Decreased Quantities

Payment to the Contractor will be made only for the actual quantities of work performed and accepted in conformance with the contract. When the accepted quantities of work vary from the original bid quantities, payment will be at the unit contract prices for accepted work unless the total quantity of any contract item, using the original bid quantity, increases or decreases by more than 25 percent. In that case that part of the increase or decrease exceeding 25 percent will be adjusted as follows:

1. Increased Quantities.

Either party to the contract will be entitled to renegotiate the price for that portion of the actual quantity in excess of 125 percent of the original bid quantity. The price for increased quantities will be determined by agreement of the parties, or, where the parties cannot agree, the price will be determined by the Engineer based upon the actual costs to perform the work, including reasonable markup for overhead and profit.

2. Decreased Quantities.

Either party to the contract will be entitled to an equitable adjustment if the actual quantity of work performed is less than 75 percent of the original bid quantity. The equitable adjustment in the case of decreased quantities shall be based upon any increase or decrease in costs due solely to the variation of the estimated quantity. The total payment for any item will be limited to no more than 75 percent of the amount originally bid for the item.

The following limitations shall apply to the adjustment:

1. The equipment rates shall be actual cost but shall not exceed the rates set forth in the AGC/WSDOT Equipment Rental Agreement in effect at the time the work is performed as referred to in Section 1-09.6.
2. No payment will be made for extended or unabsorbed home office overhead and field overhead expenses to the extent that there is an unbalanced allocation of such expenses among the contract bid items.
3. No payment for consequential damages or loss of anticipated profits will be allowed because of any variance in quantities from those originally shown in the proposal form, contract provision, and contract plans.

When ordered by the Engineer, the Contractor shall proceed with the work pending determination of the cost or time adjustment for the variation in quantities.

The Contracting Agency will not adjust for increases or decreases if the Contracting Agency has entered the amount for the item in the proposal form only to provide a common proposal for bidders.

1-08.4 Prosecution of Work

The Contractor shall begin work within 10 calendar days from the date of execution of the contract by the Contracting Agency, unless otherwise approved in writing. The Contractor shall diligently pursue the work to the physical completion date within the time specified in the contract. Voluntary shutdown or slowing of operations by the Contractor shall not relieve the Contractor of the responsibility to complete the work within the time(s) specified in the contract.

1-08.5 Time for Completion

The Contractor shall complete all physical contract work within the number of "working days" stated in the contract provisions or as extended by the Engineer in accordance with Section 1-08.8. Every day will be counted as a "working day" unless it is a nonworking day or an Engineer determined unworkable day. A nonworking day is defined as a Saturday, a Sunday, a day on which the contract specifically suspends work, or one of these holidays: January 1, the third Monday of January, the third Monday of February, Memorial Day, July 4, Labor Day, November 11, Thanksgiving Day, the day after Thanksgiving, and Christmas Day. When any of these holidays fall on a Sunday, the following Monday shall be counted a nonworking day. When the holiday falls on a Saturday, the preceding Friday shall be counted a nonworking day.

The days between December 25 and January 1 will be classified as nonworking days, provided that, the Contractor actually suspends work on the project.

An unworkable day is defined as a partial or whole day the Engineer declares to be unworkable because of weather, conditions caused by the weather, or such other conditions beyond the control of the Contractor that prevents satisfactory and timely performance of the work, and such performance, if not hindered, would have otherwise progressed toward physical completion of the work.

Contract time shall begin on the first working day following the 10th calendar day after the date the Contracting Agency executes the contract. The contract provisions may specify another starting date for contract time, in which case, time will begin on the starting date specified.

Each working day shall be charged to the contract as it occurs, until the contract work is physically complete. If substantial completion has been granted and all the authorized working days have been used, charging of working days will cease. Each week the Engineer will provide the Contractor a statement that shows the number of working days: (1) charged to the contract the week before; (2) specified for the physical completion of the contract; and (3) remaining for the physical completion of the contract. The statement will also show the nonworking days and any partial or whole day the Engineer declares as unworkable. Within 10 calendar days after the date of each statement, the Contractor shall file a written protest of any alleged discrepancies in it. To be considered by the Engineer, the protest shall be in sufficient detail to enable the Engineer to ascertain the basis and amount of time disputed. By not filing such detailed protest in that period, the Contractor shall be deemed as having accepted the statement as correct.

The Engineer will give the Contractor written notice of the physical completion date for all work the contract requires. That date shall constitute the physical completion date of the contract, but shall not imply the Secretary's acceptance of the work or the contract.

The Engineer will give the Contractor written notice of the completion date of the contract after all the Contractor's obligations under the contract have been performed by the Contractor. The following events must occur before the Completion Date can be established:

1. The physical work on the project must be complete; and
2. The Contractor must furnish all documentation required by the contract and required by law, to allow the Contracting Agency to process final acceptance of the contract. The following documents must be received by the Project Engineer prior to establishing a completion date:
 - a. Certified Payrolls (Federal-aid Projects)
 - b. Material Acceptance Certification Documents
 - c. Affidavit of Amounts Paid DBE/MBE/WBE Participants
 - d. FHWA 47 (Federal-aid Projects)
 - e. Final Contract Voucher Certification

1-08.6 Suspension of Work

The Engineer may order suspension of all or any part of the work if:

1. Unsuitable weather and such other conditions beyond the control of the Contractor that prevent satisfactory and timely performance of the work; or
2. The Contractor does not comply with the contract or the Engineer's orders.

When ordered by the Engineer to suspend or resume work, the Contractor shall do so immediately.

If the work is suspended for reason (1) above, the period of work stoppage will be counted as unworkable days. But if the Engineer believes the Contractor should have completed the suspended work before the suspension, all or part of the suspension period may be counted as working days. The Engineer will set the number of unworkable days (or parts of days) by deciding how long the suspension delayed the entire project.

If the work is suspended for reason (2) above, the period of work stoppage will be counted as working days. The lost work time, however, shall not relieve the Contractor from any contract responsibility.

If the performance of all or any part of the work is suspended, delayed, or interrupted for an unreasonable period of time by an act of the Contracting Agency in the administration of the contract, or by failure to act within the time specified in the contract (or if no time is specified, within a reasonable time), the Engineer will make an adjustment for any increase in the cost or time for the performance of the contract (excluding profit) necessarily caused by the suspension, delay, or interruption. However, no adjustment will be made for any suspension, delay, or interruption if (1) the performance would have been suspended, delayed, or interrupted by any other cause, including the fault or negligence of the Contractor, or (2) an equitable adjustment is provided for or excluded under any other provision of the contract.

If the Contractor believes that the performance of the work is suspended, delayed, or interrupted for an unreasonable period of time and such suspension, delay, or interruption is the responsibility of the Contracting Agency, the Contractor shall immediately submit a written notice of protest to the Engineer as provided in Section 1-04.5. No adjustment shall be allowed for any costs incurred more than 10 calendar days before the date the Engineer receives the Contractor's written notice of protest. If the Contractor contends damages have been suffered as a result of such suspension, delay, or interruption, the protest shall not be allowed unless the protest (stating the amount of damages) is asserted in writing as soon as practicable, but no later than the date of the Contractor's signature on the Final Contract Voucher Certification. The Contractor shall keep full and complete records of the costs and additional time of such suspension, delay, or interruption and shall permit the Engineer to have access to those records and any other records as may be deemed necessary by the Engineer to assist in evaluating the protest.

The Engineer will determine if an equitable adjustment in cost or time is due as provided in this section. The equitable adjustment for increase in costs, if due, shall be subject to the limitations provided in Section 1-09.4, provided that no profit of any kind will be allowed on any increase in cost necessarily caused by the suspension, delay, or interruption.

Request for extensions of time will be evaluated in accordance with Section 1-08.8.

The Engineer's determination as to whether an adjustment should be made will be final as provided in Section 1-05.1.

No claim by the Contractor under this clause shall be allowed unless the Contractor has followed the procedures provided in this Section and in Sections 1-04.5 and 1-09.11.

1-08.7 Maintenance During Suspension

Before and during any suspension (as described in Section 1-08.6) the Contractor shall protect the work from damage or deterioration. Suspension shall not relieve the Contractor from anything the contract requires unless this section states otherwise.

At no expense to the Contracting Agency, the Contractor shall provide through the construction area a safe, smooth, and unobstructed roadway for public use during suspension (as required in Section 1-07.23 or the special provisions). This may include a temporary road or detour.

If the Engineer determines that the Contractor failed to pursue the work diligently before the suspension, or failed to comply with the contract or orders, then the Contractor shall maintain the temporary roadway in use during suspension. In this case, the Contractor shall bear the maintenance costs. If the Contractor fails to maintain the temporary roadway, the Contracting Agency will do the work and deduct all resulting costs from payments due to the Contractor.

If the Engineer determines that the Contractor has pursued the work diligently before the suspension, then the Contracting Agency will do the routine maintenance work (and bear its cost). This Contracting Agency-provided maintenance work will include only routine maintenance of:

1. The traveled way, auxiliary lanes, shoulders, and detour surface,
2. Roadway drainage along and under the traveled roadway or detour, and
3. All barricades, signs, and lights needed for directing traffic through the temporary roadway or detour in the construction area.

The Contractor shall protect and maintain (and bear the costs of doing so) all other work in areas not used by traffic.

After any suspension during which the Contracting Agency has done the routine maintenance, the Contractor shall accept the traveled roadway or detour as is when work resumes. The Contractor shall make no claim against the Contracting Agency for the condition of the roadway or detour.

After any suspension, the Contractor shall retain all responsibilities the contract assigns for repairing or restoring the roadway, its slopes, and its drainage system to the requirements of the plans.

1-08.8 Extensions of Time

The Contractor shall submit any requests for time extensions to the Engineer in writing no later than 10 working days after the delay occurs. The request shall be limited to the change in the critical path of the Contractor's schedule attributable to the change or event giving rise to the request. To be considered by the Engineer, the request shall be in sufficient detail (as determined by the Engineer) to enable the Engineer to ascertain the basis and

The Contracting Agency will not pay for material on hand when the invoice cost is less than \$2,000. As materials are used in the work, credits equaling the partial payments for them will be taken on future estimates. Partial payment for materials on hand shall not constitute acceptance. Any material will be rejected if found to be faulty even if partial payment for it has been made.

1-09.9 Payments

The basis of payment will be the actual quantities of work performed according to the contract and as specified for payment.

Payments will be made for work and labor performed and materials furnished under the contract according to the price in the proposal unless otherwise provided.

Partial payments will be made once each month, based upon partial estimates prepared by the Engineer. Unless otherwise provided, payments will be made from the Motor Vehicle Fund.

Failure to perform any of the obligations under the contract by the Contractor may be decreed by the Contracting Agency to be adequate reason for withholding any payments until compliance is achieved.

Upon completion of all work and after final inspection (Section 1-05.11), the amount due the Contractor under the contract will be paid based upon the final estimate made by the Engineer and presentation of a Final Contract Voucher Certification signed by the Contractor. Such voucher shall be deemed a release of all claims of the Contractor unless a claim is filed in accordance with the requirements of Section 1-09.11 and is expressly excepted from the Contractor's certification on the Final Contract Voucher Certification. The date the Secretary signs the Final Contract Voucher Certification constitutes the final acceptance date (Section 1-05.12).

If the Contractor fails, refuses, or is unable to sign and return the Final Contract Voucher Certification or any other documentation required for completion and final acceptance of the contract, the Contracting Agency reserves the right to establish a completion date (for the purpose of meeting the requirements of RCW 60.28) and unilaterally accept the contract. Unilateral final acceptance will occur only after the Contractor has been provided the opportunity, by written request from the Engineer, to voluntarily submit such documents. If voluntary compliance is not achieved, formal notification of the impending establishment of a completion date and unilateral final acceptance will be provided by certified letter from the Secretary to the Contractor, which will provide 30 calendar days for the Contractor to submit the necessary documents. The 30 calendar day period will begin on the date the certified letter is received by the Contractor. The date the Secretary unilaterally signs the Final Contract Voucher Certification shall constitute the completion date and the final acceptance date (Section 1-05.12). The reservation by the Contracting Agency to unilaterally accept the contract will apply to contracts that are physically completed in accordance with Section 1-08.5, or for contracts that are terminated in accordance with Section 1-08.10. Unilateral final acceptance of the contract by the Contracting Agency does not in any way relieve the Contractor of their responsibility to comply with all Federal, State, or local laws, ordinances, and regulations that affect the work under the contract.

Payment to the Contractor of partial estimates, final estimates, and retained percentages shall be subject to controlling laws.

1-09.9(1) Retainage

Pursuant to RCW 60.28, a sum of 5 percent of the monies earned by the Contractor will be retained from progress estimates. Such retainage shall be used as a trust fund for the protection and payment (1) to the State with respect to taxes imposed pursuant to Title 82, RCW, and (2) the claims of any person arising under the Contract.

Monies retained under the provisions of RCW 60.28 shall, at the option of the Contractor, be:

1. Retained in a fund by the Contracting Agency, or
2. Deposited by the Contracting Agency in an escrow (interest-bearing) account in a bank, mutual saving bank, or savings and loan association (interest on monies so retained shall be paid to the Contractor). Deposits are to be in the name of the Contracting Agency and are not to be allowed to be withdrawn without the Contracting Agency's written authorization. The Contracting Agency will issue a check representing the sum of the monies reserved, payable to the bank or trust company. Such check shall be converted into bonds and securities chosen by the Contractor as the interest accrues.

At the time the Contract is executed the Contractor shall designate the option desired. The Contractor in choosing option (2) agrees to assume full responsibility to pay all costs which may accrue from escrow services, brokerage charges or both, and further agrees to assume all risks in connection with the investment of the retained percentages in securities. The Contracting Agency may also, at its option, accept a bond in lieu of retainage.

Release of the retainage will be made 60 days following the Completion Date (pursuant to RCW 39.12, and RCW 60.28) provided the following conditions are met:

1. On contracts totaling more than \$20,000, a release has been obtained from the Washington State Department of Revenue.
2. Affidavits of Wages Paid for the Contractor and all Subcontractors are on file with the Contracting Agency (RCW 39.12.040).
3. A release has been obtained from the Washington State Department of Labor & Industries (per Section 1-07.10) and the Washington State Employment Security Department.
4. All claims, as provided by law, filed against the retainage have been resolved. In the event claims are filed and provided the conditions of 1, 2, and 3 are met, the Contractor will be paid such retained percentage less an amount sufficient to pay any such claims together with a sum determined by the Contracting Agency sufficient to pay the cost of foreclosing on claims and to cover attorney's fees.

1-09.10 Payment for Surplus Processed Materials

After the Contract is completed, the Contractor will be reimbursed actual production costs for surplus processed material produced by the Contractor from Contracting Agency-provided sources if its value is \$3,000 or more (determined by actual production costs).

The quantity of surplus material eligible for reimbursement of production costs shall be the quantity produced (but an amount not greater than 110 percent of plan quantity or as specified by the Engineer), less the actual quantity used. The Contracting Agency will determine the actual amount of surplus material for reimbursement.

The Contractor shall not dispose of any surplus material without permission of the Engineer. Surplus material shall remain the property of the Contracting Agency without reimbursement to the Contractor if it is not eligible for reimbursement.

1-09.11 Disputes and Claims**1-09.11(1) Disputes**

When disputes occur during a contract, the Contractor shall pursue resolution through the Project Engineer. The Contractor shall follow the procedures outlined in Section 1-04.5. If the negotiation using the procedures outlined in Section 1-04.5 fails to provide satisfactory resolution, the Contractor shall pursue the more formalized method outlined in Section 1-09.11(2) for submitting a claim.

1-09.11(2) Claims

If the Contractor claims that additional payment is due and the Contractor has pursued and exhausted all the means provided in Section 1-09.11(1) to resolve a dispute, the Contractor may file a claim as provided in this section. The Contractor agrees to waive any claim for additional payment if the written notifications provided in Section 1-04.5 are not given, or if the Engineer is not afforded reasonable access by the Contractor to complete records of actual cost and additional time incurred as required by Section 1-04.5, or if a claim is not filed as provided in this section. The fact that the Contractor has provided a proper notification, provided a properly filed claim, or provided the Engineer access to records of actual cost, shall not in any way be construed as proving or substantiating the validity of the claim. If the claim, after consideration by the Engineer, is found to have merit, the Engineer will make an equitable adjustment either in the amount of costs to be paid or in the time required for the work, or both. If the Engineer finds the claim to be without merit, no adjustment will be made.

All claims filed by the Contractor shall be in writing and in sufficient detail to enable the Engineer to ascertain the basis and amount of the claim. All claims shall be submitted to the Project Engineer as provided in Section 1-05.15. As a minimum, the following information must accompany each claim submitted:

1. A detailed factual statement of the claim for additional compensation and time, if any, providing all necessary dates, locations, and items of work affected by the claim.
2. The date on which facts arose which gave rise to the claim.
3. The name of each Contracting Agency individual, official, or employee involved in or knowledgeable about the claim.
4. The specific provisions of the contract which support the claim and a statement of the reasons why such provisions support the claim.
5. If the claim relates to a decision of the Engineer which the contract leaves to the Engineer's discretion or as to which the contract provides that the Engineer's decision is final, the Contractor shall set out in detail all facts supporting its position relating to the decision of the Engineer.
6. The identification of any documents and the substance of any oral communications that support the claim.
7. Copies of any identified documents, other than Contracting Agency documents and documents previously furnished to the Contracting Agency by the Contractor, that support the claim (manuals which are standard to the industry, used by the Contractor, may be included by reference).

Dated _____/s/_____

Subscribed and sworn before me this _____ day of _____

Notary Public

My Commission Expires: _____

It will be the responsibility of the Contractor to keep full and complete records of the costs and additional time incurred for any alleged claim. The Contractor shall permit the Engineer to have access to those records and any other records as may be required by the Engineer to determine the facts or contentions involved in the claim. The Contractor shall retain those records for a period of not less than three years after final acceptance.

The Contractor shall pursue administrative resolution of any claim with the Engineer or the designee of the Engineer.

Failure to submit with the Final Contract Voucher Certification such information and details as described in this section for any claim shall operate as a waiver of the claims by the Contractor as provided in Section 1-09.9.

Provided that the Contractor is in full compliance with all the provisions of this section and after the formal claim document has been submitted, the Contracting Agency will respond, in writing, to the Contractor as follows:

1. Within 45 calendar days from the date the claim is received by the Contracting Agency if the claim amount is less than \$100,000;
2. Within 90 calendar days from the date the claim is received by the Contracting Agency if the claim amount is equal to or greater than \$100,000; or
3. If the above restraints are unreasonable due to the complexity of the claim under consideration, the Contractor will be notified within 15 calendar days from the date the claim is received by the Contracting Agency as to the amount of time which will be necessary for the Contracting Agency to prepare its response.

Full compliance by the Contractor with the provisions of this section is a contractual condition precedent to the Contractor's right to seek judicial relief.

1-09.11(3) Time Limitation and Jurisdiction

For the convenience of the parties to the contract it is mutually agreed by the parties that any claims or causes of action which the Contractor has against the State of Washington arising from the contract shall be brought within 180 calendar days from the date of final acceptance (Section 1-05.12) of the contract by the State of Washington; and it is further agreed that any such claims or causes of action shall be brought only in the Superior Court of Thurston County. The parties understand and agree that the Contractor's failure to bring suit within the time period provided, shall be a complete bar to any such claims or causes of action. It is further mutually agreed by the parties that when any claims or causes of action which the Contractor asserts against the State of Washington arising from the contract are filed with the State or initiated in court, the Contractor shall permit the State to have timely access to any records deemed necessary by the State to assist in evaluating the claims or action.

1-09.12 Audits**1-09.12(1) General**

The Contractor's wage, payroll, and cost records on this contract shall be open to inspection or audit by representatives of the Contracting Agency during the life of the contract and for a period of not less than three years after the date of final acceptance of the contract. The Contractor shall retain these records for that period. The Contractor shall also guarantee that the wage, payroll, and cost records of all subcontractors and all lower tier subcontractors shall be retained and open to similar inspection or audit for the same period of time. The audit may be performed by employees of the Contracting Agency or by an auditor under contract with the Contracting Agency. The Contractor, subcontractors, or lower tier subcontractors shall provide adequate facilities, acceptable to the Engineer, for the audit during normal business hours. The Contractor, subcontractors, or lower tier subcontractors shall make a good faith effort to cooperate with the auditors. If an audit is to be commenced more than 60 calendar days after the final acceptance date of the contract, the Contractor will be given 20 calendar days notice of the time when the audit is to begin. If any litigation, claim, or audit arising out of, in connection with, or related to this contract is initiated, the wage, payroll, and cost records shall be retained until such litigation, claim, or audit involving the records is completed.

1-09.12(2) Claims

All claims filed against the Contracting Agency shall be subject to audit at any time following the filing of the claim. Failure of the Contractor, subcontractors, or lower tier subcontractors to maintain and retain sufficient records to allow the auditors to verify all or a portion of the claim or to permit the auditor access to the books and records of the Contractor, subcontractors, or lower tier subcontractors shall constitute a waiver of a claim and shall bar any recovery thereunder.

1-09.12(3) Required Documents for Audits

As a minimum, the auditors shall have available to them the following documents:

1. Daily time sheets and supervisor's daily reports.
2. Collective Bargaining Agreements.
3. Insurance, welfare, and benefits records.
4. Payroll registers.
5. Earnings records.
6. Payroll tax forms.
7. Material invoices and requisitions.
8. Material cost distribution worksheet.
9. Equipment records (list of company equipment, rates, etc.).
10. Vendors', rental agencies', subcontractors', and lower tier subcontractors' invoices.
11. Contracts between the Contractor and each of its subcontractors, and all lower-tier subcontractor contracts and supplier contracts.
12. Subcontractors' and lower tier subcontractors' payment certificates.
13. Canceled checks (payroll and vendors).
14. Job cost reports, including monthly totals.
15. Job payroll ledger.
16. General ledger.
17. Cash disbursements journal.

18. Financial statements for all years reflecting the operations on this contract. In addition, the contracting Agency may require, if it deems appropriate, additional financial statements for 3 years preceding execution of the contract and 3 years following final acceptance of the contract.
19. Depreciation records on all company equipment whether these records are maintained by the company involved, its accountant, or others.
20. If a source other than depreciation records is used to develop costs for the Contractor's internal purposes in establishing the actual cost of owning and operating equipment, all such other source documents.
21. All documents which relate to each and every claim together with all documents which support the amount of damages as to each claim.
22. Worksheets or software used to prepare the claim establishing the cost components for items of the claim including but not limited to labor, benefits and insurance, materials, equipment, subcontractors, all documents which establish the time periods, individuals involved, the hours for the individuals, and the rates for the individuals.
23. Worksheets, software, and all other documents used by the Contractor to prepare its bid.

An audit may be performed by employees of the Contracting Agency or a representative of the Contracting Agency. The Contractor and its subcontractors shall provide adequate facilities acceptable to the Contracting Agency for the audit during normal business hours. The Contractor and all subcontractors shall cooperate with the Contracting Agency's auditors.

1-09.13 Claims Resolution

1-09.13(1) General

Prior to seeking claim resolution through nonbinding alternative dispute resolution processes, binding arbitration, or litigation, the Contractor shall proceed under the administrative procedures in Sections 1-04.5, 1-09.11 and any special provision provided in the contract for resolution of disputes. The provisions of these sections must be complied with in full, as a condition precedent to the Contractor's right to seek claim resolution through any nonbinding alternative dispute resolution process, binding arbitration or litigation.

1-09.13(2) Nonbinding Alternative Disputes Resolution (ADR)

Nonbinding ADR processes are encouraged and available upon mutual agreement of the Contractor and the Contracting Agency for all claims submitted in accordance with Section 1-09.11, provided that:

1. All the administrative remedies provided for in the contract have been exhausted;
2. The Contracting Agency has been given the time and opportunity to respond to the Contractor as provided in Section 1-09.11(2); and
3. The Contracting Agency has determined that it has sufficient information concerning the Contractor's claims to participate in a nonbinding ADR process.

The Contracting Agency and the Contractor mutually agree that the cost of the nonbinding ADR process shall be shared equally by both parties with each party bearing its own preparation costs.

The type of nonbinding ADR process shall be agreed upon by the parties and shall be conducted within the State of Washington at a location mutually acceptable to the parties.

1-99 APWA SUPPLEMENT***SECTION 1-01.3 IS SUPPLEMENTED BY ADDING THE FOLLOWING DEFINITIONS:***

All references in the Standard Specifications to the terms "State", "Department of Transportation", "Washington State Transportation Commission", "Commission", "Secretary of Transportation", "Secretary", "Headquarters", and "State Treasurer" shall be revised to read "Contracting Agency".

All references to "Olympia Service Center Materials Laboratory" shall be revised to read "Contracting Agency designated location".

The venue of all causes of action arising from the contract shall be in the Superior Court of the county where the Contracting Agency's headquarters is located.

1-01.3 Definitions (APWA only)**Additive (APWA only)**

A supplemental unit of work or group of bid items, identified separately in the proposal, which may, at the discretion of the Contracting Agency, be awarded in addition to the base bid.

Alternate (APWA only)

One of two or more units of work or groups of bid items, identified separately in the proposal, from which the Contracting Agency may make a choice between different methods or material of construction for performing the same work.

Contract Documents (APWA only)

See definition for "Contract".

Contract Time (APWA only)

The period of time established by the terms and conditions of the contract within which the work must be physically completed.

Dates (APWA only)***Bid Opening Date***

The date on which the Contracting Agency publicly opens and reads the bids.

Award Date

The date of the formal decision of the Contracting Agency to accept the lowest responsible and responsive bidder for the work.

Contract Execution Date

The date the Contracting Agency officially binds the agency to the contract.

Notice to Proceed Date

The date stated in the Notice to Proceed on which the contract time begins.

Substantial Completion Date

The day the Engineer determines the Contracting Agency has full and unrestricted use and benefit of the facilities, both from the operational and safety standpoint, and only minor incidental work, replacement of temporary substitute facilities, or correction or repair remains for the physical completion of the total contract.

Contract Completion Date

The date by which the work is contractually required to be physically completed. The Contract Completion Date will be stated in the Notice to Proceed. Revisions of this date will be authorized in writing by the Engineer whenever there is an extension to the contract time.

Physical Completion Date

The day all of the work is physically completed on the project. All documentation required by the contract and required by law does not necessarily need to be furnished by the Contractor by this date.

Completion Date

The day all the work specified in the contract is completed and all the obligations of the Contractor under the contract are fulfilled by the Contractor. All documentation required by the contract and required by law must be furnished by the Contractor before establishment of this date.

Final Acceptance Date

The date on which the Contracting Agency accepts the work as complete.

Notice of Award (APWA only)

The written notice from the Contracting Agency to the successful bidder signifying the Contracting Agency's acceptance of the bid.

Notice to Proceed (APWA only)

The written notice from the Contracting Agency or Engineer to the Contractor authorizing and directing the Contractor to proceed with the work and establishing the date on which the contract time begins.

SECTION 1-02.1 IS DELETED AND REPLACED BY THE FOLLOWING:***1-02.1 Qualifications of Bidder (APWA only)***

Bidders shall be qualified by experience, financing, equipment, and organization to do the work called for in the Contract Documents. The Contracting Agency reserves the right to take whatever action it deems necessary to ascertain the ability of the bidder to perform the work satisfactorily. This action may include a prequalification procedure prior to the bidder being furnished a proposal form on any contract, or a pre-award survey of the bidder's qualifications prior to award.

APPENDIX B

November 12, 2002

VIA FACSIMILE: ORIGINAL TO BE MAILED

David R. Trachtenberg
Groff Murphy Trachtenberg & Everard, PLLC
300 East Pine
Seattle, WA 98122

Re: LOTT Wastewater Alliance: Katspan claims

Dear Mr. Trachtenberg:

I am writing regarding Katspan, Inc.'s claims against the LOTT Wastewater Alliance on the Southern Connection Project. Without waiving any of its defenses, LOTT has stated several times that it is willing to negotiate these claims in order to come to a quick resolution.

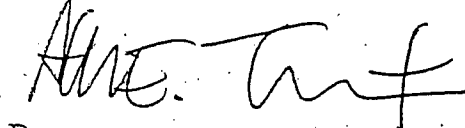
Though Katspan has produced some documentation in support of its claims, LOTT has requested additional information. Importantly, LOTT has requested a detailed job cost, or similar, report. I wrote you on August 1 requesting this additional information. Katspan has been unable to produce the requested information.

On October 2, Tom Wolfendale sent you an email stating that LOTT is willing to commence negotiations on the condition that Katspan understand LOTT will not negotiate on claim items for which no or inadequate backup information has been provided. Mr. Wolfendale asked that you let him know whether these terms were acceptable to Katspan and when and how Katspan would like to proceed. We have not received a response.

Please let us know whether Katspan would like to proceed with negotiations and, if so, how and when Katspan would like to proceed. If not, please let us know if Katspan will be producing the requested information or whether Katspan has abandoned its claims against LOTT.

Very truly yours,

PRESTON GATES & ELLIS LLP



By

Athan E. Tramountanas

David R. Trachtenberg

November 12, 2002

Page 2

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cc: Michael Strub, LOTT Wastewater Alliance
Brian Topolski, LOTT Wastewater Alliance
Tom Wolfendale

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FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION II

AMERICAN SAFETY CASUALTY
INSURANCE COMPANY, a foreign
corporation,

Plaintiff,

v.

CITY OF OLYMPIA,

Defendant.

No. 33446-1

DECLARATION OF
SERVICE

Joani Radenich declares as follows:

I am and at all times hereinafter mentioned was a citizen of the United States, a resident of the State of Washington, over the age of 21 years, competent to be a witness in the above action, and not a party thereto; that I effected service on the 13th day of February, 2006, by delivering a true copy of:

Brief of Respondent City of Olympia

by messenger, to the offices of:

Mr. Jerret E. Sale
Attorney at Law
Bullivant Houser Bailey PC
1601 Fifth Ave., Suite 2300
Seattle, WA 98101-1618

I declare under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct

DATED this 13th day of February, 2006.

By 
Joani Radenich

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